No. 22650 A & B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22650 A & B

A & A SIGN COMPANY, INC., Appellant,

v.

REX E. MAUGHAN, Trustee of MAYER CENTRAL BUILDING CORPORATION, a Debtor, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

This appeal is brought and the Court's jurisdiction invoked pursuant to Title 11, § 47 of the United States Code Annotated.

NATURE OF THE CASE

This case arises out of a stipulation entered into between the Appellant and the Trustee establishing and affirming certain lien rights of the Appellant and the order of court approving said stipulation at a Section 197 Hearing and the subsequent order of court setting aside the stipulation and previous order pursuant to motion by Trustee.

Specifically, the matters forming the subject of this appeal are a series of Findings of Fact, Conclusions of Law, and Orders made by The Honorable C. A. Muecke on

October 20 and October 24, 1967, which affected substantial rights of the Appellant.

STATEMENT OF ISSUES ON APPEAL

1. At what point in time did the debtor corporation, MAYER CENTRAL BUILDING CORPORATION, acquire the vendee's interest in the "Ann Clark" Property?

2. Is the vendee's interest in real property it is purchasing by a contract of sale subject to a labor and materialmen's claim of lien?

3. From the date of its filing on September 23, 1965, to date, was and is the Labor and Materialmen's Lien of A & A SIGN COMPANY, INC., a valid and subsisting lien, claim and encumbrance on and against the debtor corporation's interest as vendee in the "Ann Clark" Property and/or the proceeds of the sale of the "Ann Clark" Property?

4. Is the Stipulation of February 21, 1967, between A & A SIGN COMPANY, INC., and Walter Fulford as Trustee of the bankrupt corporation a valid and enforceable agreement?

5. If said Stipulation is a valid and enforceable agreement, does the court have jurisdiction to set the same aside, or is it an abuse of discretion to set it aside?

lien or encumbrance by any party to these proceedings.

6. Supplemental Finding of Fact No. 97 - dated October 24, 1967, wherein the lower court found that the estate of the debtor corporation did not have sufficient assets to satisfy the claims of secured creditors in full and has no assets available for distribution to general creditors and stockholders.

(a) As to the lower court's order of October 24, 1967, determining objections to the allowance of creditor's claims, determining the value of security subject to the claims of secured creditors and classifying creditors and stockholders.

(b) No. 8 on page 5, wherein the lower court finds that the debtor corporation owns the "Ann Clark" Property and any funds which are or may be generated from the sale of said property are free and clear of all liens or encumbrances by any party to those proceedings.

(c) No. 10 on page 5 - wherein the lower court found that the claim of lien of A & A SIGN COMPANY, INC., even if otherwise valid, exceeds the value of its security in its entirety and such claim is hereby classified as unsecured.

STATEMENT OF FACTS IN APPEALS

Beginning on November 5, 1964, and continuing through June 28, 1965, the Appellant herein performed certain work and furnished certain materials in the alteration, construction and erection of certain buildings and improvements now upon that real property situated in the City of Phoenix, County of Maricopa, State of Arizona, more particularly described in the liens filed by Appellant (Appellant's Exhibit No. 1).

That the reasonable value of said work and materials furnished was in the sum of $21,793.28 and that said work was performed by Appellant as a direct contractor for the owner of said premises; that notice and claim of lien was properly filed and recorded in the office of the County Recorder of Maricopa County, Arizona, on September 23, 1965, and within the time allowed by Arizona Statute and properly served upon the owners of the premises (See Appellant's Exhibit No. 1).

That on October 1, 1963, Ann Louise Clark entered into a contract of sale of real property with the Mayer Development Company, a partnership consisting of Lawrence D. Mayer and Eric D. Mayer whereby Ann Louise Clark sold to Mayer Development Company that certain real property

described in said Agreement for Sale (Appellant's Exhibit No. 3).

That subsequent to the proceedings in bankruptcy of the Mayer Central Building Corporation, it was learned that the Mayer Development Company, a partnership, had failed and neglected to deed over this so-called "Ann Clark" Property to the Mayer Central Building Corporation; that on March 15, 1966, a hearing was held before The Honorable Vincent D. Maggiore, Referee and Special Master (see Appellant's Exhibit No. 4).

That the Findings of Fact of the Referee and Special Master included, *inter alia,* that all the payments for the "Ann Clark" Property were made by the debtor corporation (Mayer Central Building Corporation); that the improvements on this property were installed and paid for by the debtor corporation.

That the Mayer Development Company has failed to deed or assign the buyer's interest in the said property to the debtor corporation.

That the Conclusions of Law of the Referee and Special Master included, *inter alia,* that the debtor corporation has both the legal and equitable right and title to the buyer's interest in the "Ann Clark" Property.

That the order of the Referee and Special Master required, *inter alia*, that the Mayer Development Company, a co-partnership, execute and record a deed and assignment of all their right, title and interest in the "Ann Clark" Property to the debtor corporation.

This order of the Referee and Special Master was complied with immediately thereafter on April 2, 1966.

On February 21, 1967, at a Section 197 Hearing, Appellant and Trustee for the debtor corporation entered into a stipulation, and The Honorable C. A. Muecke signed an order pursuant thereto wherein the lien of the Appellant was affirmed as to the so-called "South" and "North" Property of the debtor corporation. The "North" Property included the "Ann Clark" Property by legal description (See Appellant's Exhibit No. 5). Contemporaneously with this stipulation and order and as consideration for the stipulation, the Appellant had executed a partial release of lien as to the so-called "South" Property of the debtor corporation in consideration of receiving $7,500 (See Appellant's Exhibit No. 2).

The stipulation and order also contained, in summary, the following:

That the materialmen's lien filed by Appellant was a

valid and subsisting one, properly filed, recorded and served and that the Trustee withdrew any objections to the claim of Appellant both as to amount and security.

In the late summer of 1967, the Trustee moved the court to be allowed to correct his stipulation with Appellant by deleting the legal description of the "Ann Clark" Property therefrom, claiming as his reason therefor inadvertence and mistake on his part. Subsequently evidence was taken and argument was had on the Trustee's motion; and on October 20, 1967, The Honorable C. A. Muecke, in his Findings of Fact and Conclusions of Law, sustained the Trustee's contention and went even further by finding that prior to April 2, 1966 (the date the Mayer Development Company, as co-partnership, deeded the "Ann Clark" Property over to the debtor corporation), the debtor corporation had no interest in the "Ann Clark" Property. It should be noted that the Trustee's position was sustained indirectly in that nowhere in the Findings of Fact and Conclusions of Law of October 20, 1967, and October 24, 1967, does the court find mistake or inadvertence as claimed by the Trustee, but rather the Appellant's lien claim is denied on the basis that the "Ann Clark" Property was not in the debtor corporation at the time of the

filing of Appellant's materialmen's claim of lien and that the "Ann Clark" Property is still to be treated as a separate parcel of property rather than as part of the "North" Property.

SUMMARY OF ARGUMENT

It is Appellant's position that:

1. Under the doctrine of Constructive Trust, the debtor corporation's interest in the "Ann Clark" Property relates back to the date the Mayer Central Development Company, a partnership, first contracted to purchase the property from Ann Clark, that is to say, October 1, 1963.

2. The vendee's interest in real property being purchased under a contract of sale is subject to a materialmen's and laborers' lien.

3. The lien notice filed by A & A SIGN COMPANY, INC., the Appellant herein, was in substantial compliance with Arizona law.

4. The stipulation between the Appellant and the Trustee was a valid and enforceable contract and was not entered into inadvertently by the Trustee, and that the Trustee wholly failed to make an evidentiary showing of inadvertence or neglect.

STATEMENT OF APPELLANT'S POINTS AND AUTHORITIES

I

At what point in time did the debtor corporation, Mayer Central Building Corporation, acquire the vendee's interest in the "Ann Clark" Property?

Simply stated, it is Appellant's position that the debtor corporation's interest in the "Ann Clark" Property relates back to the purchase agreement (Appellant's Exhibit No. 3) between Ann Clark and the Mayer Development Company, a partnership, on October 1, 1963. This contention is based on the theory that at the time of the consummation of this agreement, the Mayer Development Company, a partnership, took the vendee's interest in Constructive Trust for the debtor corporation. It is clearly pointed out in Appellant's Exhibit No. 4, the report of the Referee and Special Master, that the debtor corporation made all the payments on the "Ann Clark" Property and, therefore, the vendee's interest properly belonged in the debtor corporation. While not spelled out, it is obvious that the Referee's and Special Master's findings were bottomed on the fact that it would have been a constructive fraud against the debtor corporation and unjust enrichment to the Mayer partnership to allow

the vendee's interest to remain with the Mayer Development Company, a partnership.

> "A Constructive Trust may be defined as the device used by Chancery to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs."
> BOGERT, *Trusts & Trustees*, 2d Edition, Chapter 24, § 471 (citing cases).
>
> "There must be some fraudulent or unfair and unconscionable conduct rendering it inequitable for the Trustee to retain title in order to create a constructive trust, but a constructive trust may be imposed to prevent unjust enrichment without regard to actual fraud."
> C.J.S. *Trusts*, § 139, pp. 1021-23.
>
> "In order that fraud or other wrongdoing may give rise to a constructive trust, it must exist at the inception of title to the property or inhere in the transaction by which the Trustee acquires title."
> C.J.S., *supra* (citing cases).
>
> "The results of the decisions seem to show, however, that when the wrongful holding of the property interest begins, the wronged party has a cause of action to obtain a constructive trust which is usually alternative to another remedy at law or equity, that the constructive trust is created by Court decree establishing the trust, but that when created, *the court regulates the rights of the parties as if the trust had been in existence from the date of the wrongful acquisition. The law-created trust relates back to the time of the wrong and makes the rights of the original parties and their successors in interest the same as would have been the rights of Cestui and Trustee of an express trust and their successors.*" (Emphasis supplied).
> BOGERT, *supra*, § 472.

Also, see *Markel v. Phoenix Title & Trust,* 100 Ariz. 53, 410 P.2d 662, and *Linder v. Lewis, Roca, et al,* 85 Ariz. 118, 333 P.2d 286; and in *Smith v. Connor,* 87 Ariz. 6, 347 P.2d 568, the Arizona Supreme Court affirmed the general rule that a constructive trust is declaratory of the rights and interests at the time of the questioned transaction, and it reverts back to the time of the transaction which gave rise to the constructive trust. This statement of law is implicit in the Referee's and Special Master's report.

> "If as is often the case, the defendant has received income or other benefits from the property since the date of his wrongful acquisition of it and has made expenditure on account of the property, the benefit of which will inure to the complainant, the Court will decree an accounting so that the defendant may receive the appropriate debits and credits." BOGERT, *supra,* § 472 (citing cases).

Based on the foregoing, it is clear beyond dispute that the Mayer Development Company, a partnership, took the vendee's interest in the "Ann Clark" Property, as Trustee of a constructive trust for the Mayer Central Building Corporation and that the Mayer Central Building Corporation has always had the vendee's interest in the property. The Findings of Fact and Conclusions of Law (Appellant's Exhibit No. 4) of the Referee and Special

Master can lead to no other conclusion.

Therefore, Appellant urges that the court below committed material and reversible error when, in its Findings of Fact dated October 20, 1967, page 3, lines 23 and 24 thereof, it stated: "Prior to April 2, 1966, the debtor corporation had no interest in the Ann Clark Property."

II.

Is a vendee's interest in real property it is purchasing by a contract of sale subject to a labor and materialmen's claim of lien?

The authorities and cases in this particular area answer this question with a resounding "Yes."

In *Staley v. Woodruff*, 257 Ala. 571, 60 So. 2d 384, it was held that a contract between a materialman and a vendee of real property under an executory contract of sale was a contract with the "owner" of the real property for purposes of establishing a lien on the vendee's interest in the real property.

In *Creson v. Main*, 260 Ala. 318, 70 So. 2d 417, the Alabama Supreme Court upheld a lien against a purchaser's interest in real property to the extent of that interest and said there was no requirement of service of notice

upon the grantor as a condition to fastening a lien upon the interest of the grantee. In *Woods v. Deckelbaum*, 178 N.E.2d 544, the Indiana high court upheld the validity of a mechanic's lien against the interest of a vendee in real property while excluding the vendor's interest from such claim of lien.

And in *Blanton v. Owen*, 203 Va. 73, 122 S.E.2d 650, the Virginia Supreme Court affirmed a mechanic's lien against the vendee's interest in real property.

WEST'S California Code of Civil Proceedings, § 1183.1, specifically provides for mechanic's and materialmen's liens to attach to estates in land that are less than fee simple.

In Arizona, materialmen's lien attaches to the extent of the debtor's interest in the land.

In C.J.S. *Mechanic's Liens*, § 16, Vol. 57, p. 511, the author writes:

> "Although there is authority to the contrary, ordinarily a mechanic's lien may attach to an equitable estate or interest in land unless the title is held under some condition which prohibits the owner of the equitable interest from placing a lien thereon. The interest of one who is in possession of land under a contract of purchase and who erects a building or other improvement thereon is subject to the lien." (Citing cases).

The applicable Arizona statute is A.R.S. 33-981, and it reads as follows:

> "A. Every person who labors or furnishes materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improvement whatever, shall have a lien thereon for the work or labor done or materials, machinery, fixtures or tools furnished, whether the work was done or articles furnished at the instance of the owner of the building, structure or improvement, or his agent."
>
> "B. Every contractor, sub-contractor, architect, builder or other person having charge or control of the construction, alteration or repair, either wholly or in part, of any building, structure or improvement, is the agent of the owner for the purposes of this article, and the owner shall be liable for the reasonable value of labor or materials furnished to his agent."

Arizona has long recognized that a mechanic's and materialmen's lien will attach to an estate in land that is less than fee simple. In *Demund Lumber Co. v. Franks*, 40 Ariz. 461, 14 P.2d 256, the Arizona Supreme Court affirmed a materialmen's lien as against a lessee's interest in real property stating:

> "It is undoubtedly the law in Arizona that only the interest of the party who causes the building to be erected or the materials to be furnished can be ordered sold to satisfy mechanics' or materialmen's liens, and where the owner of the premises has leased them, a person furnishing

> material or doing labor for the lessee on the premises may have a lien against the particular estate of the lessee. . . ."

Also, see *Ernst v. Deister*, 42 Ariz. 379, 26 P.2d 648.

City of Phoenix v. State ex rel. Harless, 60 Ariz. 369, 137 P.2d 783, involved, *inter alia*, the right of a mortgagee in possession of realty to sign petitions of annexation under a city ordinance annexing certain county areas into the City of Phoenix.

In defining the word owner, the court said:

> "The word *owner* has no technical meaning, but its definition will contract or expand according to the subject matter to which it is applied. *As used in statutes it is given the widest variety of construction, usually guided in some measure by the object sought to be accomplished in the particular instance. It has lead some Courts to declare that the word has no precise legal signification and may be applied to any defined interest in real estate.* It is true the legal title to these parcels of real estate had not yet passed to the purchaser, yet they were in possession, exercised dominion over them, *could rent or lease them, paid the taxes, and to the extent of these payments at least were the equitable owners. 'After the execution of the contract,'* to use the language of the Court in Williamson v. Neeves, 94 Wis. 656, 69 N.W. 806, 809, '*The vendee must be regarded as the real owner of the property,* though not the holder of the legal title.'" (Emphasis supplied).

Also, see *Pinkerton v. Pritchard*, 71 Ariz. 117, 223 P.2d 933.

Thus, when the language of *City of Phoenix, supra,* to the effect that the word "owner" is to be construed according to the objective sought, is examined in the light of the cases indicating the materialmen's lien statute is remedial in nature and to be liberally construed (see *Peterman-Donnelly Engineer v. First National Bank of Arizona,* 2 Ariz. App. 321, 408 P.2d 841, and *Ranch House Supply Corp. v. Van Slyke,* 91 Ariz. 177, 370 P.2d 661), and when the other authorities in this area are added, it is then quite evident that a materialmen's lien does, in the State of Arizona, attach to the vendee's interest in real property and more particularly that the lien of the Appellant did attach to the bankrupt corporation's interest in the so-called "Ann Clark" Property.

The Arizona Supreme Court has gone even further to hold that the vendor's interest is subject to the lien if the vendee is required to construct the improvements. *Mills v. Union Title Co.*, 101 Ariz. 297, 419 P.2d 81 (1966).

III.

Appellant would next address himself to the validity of the materialmen's and laborers' lien that it filed against the debtor corporation on September 23, 1965.

The applicable Arizona Statutes read as follows:

A.R.S. 33-981:

> "A. Every person who labors or furnishes materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improvement whatever, shall have a lien thereon for the work or labor done or materials, machinery, fixtures or tools furnished, whether the work was done or articles furnished at the instance of the owner of the building, structure or improvement, or his agent."
>
> "B. Every contractor, sub-contractor, architect, builder or other person having charge or control of the construction, alteration or repair, either wholly or in part, of any building, structure or improvement, is the agent of the owner for the purposes of this article, and the owner shall be liable for the reasonable value of labor or materials furnished to his agent."

A.R.S. 33-993:

> "In order to impress and secure the lien provided for in this article, every original contractor, within ninety days, and every other person claiming the benefits of this article, within sixty days after the completion of a building, structure or improvement, or any alteration or repair thereof, shall make duplicate copies of a notice and claim of lien and file one copy with the county recorder of the county in which the property or some part thereof is located, and within a reasonable time thereafter serve the remaining copy upon the owner of the building, structure or improvement, if he can be found within the county. The notice and claim of lien

> shall be made under oath by the claimant or some one with knowledge of the facts, and shall contain:
>
> 1. A description of the lands and improvements to be charged with a lien, sufficient for identification.
>
> 2. The name of the owner or reputed owner of the property concerned, if known, and the name of the person by whom the lienor was employed or to whom he furnished materials.
>
> 3. A statement of the terms, time given and condition of the contract, if it is oral, or a copy of the contract, if written.
>
> 4. A statement of the lienor's demand, after deducting just credits and offsets."

An examination of Appellant's Exhibit No. 1, the Notice and Claim of Labor and Materialmen's Lien, shows that there has been, at the very least, substantial compliance with the requirements of A.R.S. 33-993(1-4).

1. There is a concise and accurate legal description of the land sought to be charged with the lien (including this "Ann Clark" parcel).

2. The names of the owners and reputed owners are also clearly set forth as well as the fact that it was the debtor corporation, Mayer Central Building Corporation, that caused the improvements to be constructed.

3. The Arizona Supreme Court, as well as the Arizona

Court of Appeals, have on several occasions construed the meaning of Section 3 of A.R.S. 33-993.

In *Lanier v. Lovett,* 25 Ariz. 54, 213 Pac. 391, the defendant in an action to foreclose a mechanic's lien asserted:

> "That the contract set out in the notice of lien does not meet the requirements of this statute in that it does not state what labor was to be performed or material furnished and further that the notice itself is defective in not itemizing such material and labor."

The Court's answer was:

> "It seems to us the contract as stated is not open to serious criticism since it embraces all work and material to a completed job of plumbing. The omission in the notice of lien to itemize the different articles that went into the job and the days of labor consumed in placing them, may be excused on the theory that they were not under the contract between the contractor and plaintiff to be paid as furnished or rendered but as a whole."

Also see *Leeson v. Bartol,* 55 Ariz. 160, 99 P.2d 485, which further affirms the proposition that a substantial compliance is all that is necessary to secure the lien under A.R.S. 33-993.

> "The purpose of the requirements of A.R.S. 33-993 is to give the property owners an opportunity to protect themselves and time to investigate the claim and determine whether it is a proper

charge and lien statutes being remedial are to be liberally construed. Substantial compliance not inconsistent with the legislative purpose is sufficient.

If we were to require more than substantial compliance, we would be inviting an absurdity. Construction contracts, typically, are lengthy documents. Specification plans and general conditions are usually incorporated and made part of the contract. To require that an exact copy of such a contract be recorded and served would impose an unreasonable burden on those asserting lien claims as well as on the county recorders and would serve no useful purpose. Further, the parol evidence rule notwithstanding, few contracts for construction are unaffected by oral modifications. A strict reading of the statute, then, would omit these portions of the agreement between the parties. We hold that substantial compliance with the requirement that a . . . copy of the contract . . . be included in the notice is sufficient."

Peterman-Donnelly Eng. & Construction Corp. v. First National Bank of Arizona, 2 Ariz. App. 321, 408 P.2d 841.

The *Peterman* case, *supra,* involved, *inter alia,* defendant's assertion that the failure of the lien claimant to fully set out the terms of the contract meant the claimant had failed to comply with A.R.S. 33-993 and, therefore, had not perfected his lien.

The Court, in *Peterman,* went on to say:

"Obviously the quoted portions of the notice do not strictly satisfy the statutory requirement of a . . . *copy of the*

> *contract . . . but it is equally evident that the principal terms of the agreement have been incorporated into the notice: The parties, the date, the purpose and the consideration.* What is lacking is a recital of the fine print terms of a standard form contract. *The question is: Does such an omission so avoid the statutory requirement as to negative legislative intent? We think not.*"
> (Emphasis supplied).

Applying the criteria indicated in *Peterman, supra,* it is apparent (1) that the parties are clearly set forth; (2) the dates involved are set forth not once but twice. The first time in the body of the affidavit itself and then again in the summary invoice that is attached to the notice of lien; (3) the type of work and where and when performed is also clearly shown as well as the consideration. In addition, the summary of the work done and amounts charged also indicates the number of each individual work invoice submitted to the bankrupt corporation on the date indicated.

If, as *Peterman, supra,* says:

> "The purpose of the requirements of A.R.S. 33-993 is to give the property owner an opportunity to protect himself and time to investigate the claim and determine whether it is a proper charge,"

then it is submitted that the notice of lien herein more than meets such a standard; (4) and of course the notice

does contain the lienor's demand after deducting any just credits and offsets.

"The purpose of a materialmen's lien statute is to protect laborers and materialmen enhancing the value of another's property." *Ranch House Supply Corp. v. Van Slyke*, 91 Ariz. 177, 370 P.2d 661.

"It is the public policy of Arizona to protect the rights of those who furnish labor and material in the improvement of property." *Pioneer Plumbing Supply Co. v. Southwest Savings & Loan Ass'n*, 3 Ariz. App. 495, 415 P.2d 893, *vacated on other grounds*, 102 Ariz. 258, 428 P.2d 115.

Therefore, based on all of the foregoing, Appellant urges that the court below was in error when it found that the Appellant had not perfected its lien in accordance with Arizona law. On the facts and law, Appellant did have and still does have a valid lien. And it is further submitted that based on the facts and law cited in Part I of this argument that the aforementioned lien did and still does attach to the vendee's interest in the "Ann Clark" Property and/or the vendee's interest in the proceeds of the sale of such property, and it should be noted the Trustee is presently consummating a sale of the "Ann Clark" Property.

IV.

Appellant's next question for review is concerned with the validity of the Stipulation of February 21, 1967 (Appellant's Exhibit No. 5), by and between Appellant and the Trustee and his attorney.

By way of background, Appellant calls the Court's attention to the fact that the original lien and claim filed and recorded by Appellant on September 23, 1965, included Lot 1, Block 1, Catalina Place, the so-called "Ann Clark" Property. The claim filed with the court and the lien foreclosure suit by Appellant that was filed in the Superior Court of Maricopa County, Arizona, included Lot 1, Block 1, Catalina Place, and the Stipulation and Order (Appellant's Exhibit No. 5) of February 21, 1967, included Lot 1, Block 1, Catalina Place.

Lot 1, Block 1, Catalina Place, is, to the naked eye, the northeast corner of the parking lot and was always considered by all parties concerned, including the Trustee in Bankruptcy and the Appellant, as part and parcel of the so-called "North" Property.

It was, however, subsequently discovered that Lot 1, Block 1, Catalina Place, was still in the name of the Mayer Development Co., a partnership, even though the

funds used to initially acquire this property and all subsequent payments had been supplied by the debtor corporation. On March 21, 1966 (eleven months prior to the Stipulation in question), a hearing was held before The Honorable Vincent D. Maggiore, Referee and Special Master (see Appellant's Exhibit No. 4). Referee Maggiore found, *inter alia*, as a conclusion of law that "the debtor corporation had both the legal and equitable right and title to the buyer's interest in said agreement."

Based on this finding, Referee Maggiore ordered the Mayer Development Company, a partnership, to execute a deed and assignment of their buyer's interest to the debtor corporation. This "turn over" order was not resisted by the Mayer Development Company and was very shortly thereafter complied with.

The effect of their order was really twofold. First of all it served to confirm the vendee's interest in the "Ann Clark" Property in the debtor corporation, an interest which was really always in the debtor corporation and further served to "relate back" the debtor corporation's title to the "Ann Clark" Property to the time of the original purchase agreement (see Appellant's Exhibit No. 3).

Second, it served to merge the "Ann Clark" Property back into the "North" Property where it had always, in effect, been.

With this background in mind, Appellant must take issue with the lower court's finding that the Trustee and his attorney were *both* inadvertent and neglectful when they signed the Stipulation of February 21, 1967.

The resemblance of a stipulation to a contract is a close and striking one and the language of the cases dealing with stipulation sounds in contract. "A stipulation concerning a pending cause in court *is to be construed like other contracts or written instruments between parties.*" (Emphasis supplied) *Evans v. Raper,* 185 Okla. 126, 93 P.2d 754.

"Generally, stipulations should receive a fair and liberal construction in harmony *with the apparent intention* of the parties and the spirit of justice." (Emphasis supplied) *Brandt's Estate,* 67 Ariz. 42, 190 P.2d 497. "In construing stipulations, in cases of doubt, that construction should be adopted which is favorable to the party in whose favor it is made." *Brandt, supra.*

"In construction of stipulations, the principal rule is to ascertain and give effect to the intentions of the

parties." *Gear v. City of Phoenix*, 93 Ariz. 260, 379 P.2d 972.

In *Evans, supra*, the Oklahoma Supreme Court also held that,

> "It is a well settled proposition of law that litigants may stipulate concerning their respective rights involved in the case and are bound thereby where the agreements contained in the stipulation are not obtained through fraud or not contrary to law or public policy, and that the Courts will enforce the same."

In the matter at bar, the Stipulation of February 21, 1967, further supports the contract analogy in that the Stipulation not only recites the parties and their obligations but also recites the consideration (*i.e.*, partial release of lien for partial payment) as to the "South" Property.

If, then, we are dealing with a contract situation, it is necessary to further inquire into contract law in relation to the facts of this case.

V.

The Trustee is claiming, basically, that he made a mistake. There can be no question after reading Appellant's Exhibit No. 6 that the Appellant was, at all times,

fully aware of the significance of the legal description of the liened property and that it included the "Ann Clark" Property and further that this was the intention of the Appellant. Thus, we have a situation involving, at best, a unilateral mistake on the part of the Trustee and his attorney. And in a situation involving unilateral mistake, the general rule is that relief will be denied to the mistaken party unless the other party can be put back in status quo. CORBIN ON CONTRACTS, Vol. 3, Chapter 28, § 606.

Further, "It is essential in order to obtain a decree *rescinding or reforming a written conveyance, contract, assignment or discharge for mistake, that the facts necessary for the allowance of the remedy shall be proved by clear and convincing evidence and not by a mere preponderance.*" (Emphasis supplied) RESTATEMENT, CONTRACTS, § 511.

It is quite evident that the Trustee has failed to carry this burden, the sum and substance of their excuse being that, "There was a lot of work involved and we just slipped up here."

There is authority for the proposition that the mere claiming and alleging of inadvertence or carelessness is

not by itself sufficient to vacate a judgment or final order. See *Federal Enterprises v. Frank Allbritton Motors*, 16 F.R.D. 109 (D.C. Mo. 1954); *In re Wright*, 247 F. Supp. 648 (D.C. Mo. 1965); *Frank v. New Amsterdam Cas. Co.*, 27 F.R.D. 258 (D.C. Pa. 1961).

Of course, motions to vacate or other relief from an order are addressed to the sound discretion of the court. *Wojton v. Marks*, 344 F.2d 22 (C.A. Ill. 1965); *Swan v. United States*, 327 F.2d 43 (C.A. Ill. 1964), *cert. denied*, 85 Sup. Ct. 98, 379 U.S. 852.

> "Generally whether there exists a sufficient showing of inadvertence or excusable neglect—is a matter of discretion with the trial court, *although the discretion is not an arbitrary one but a sound legal discretion guided by accepted principles.*" (Emphasis supplied).
> *Smith v. Stone*, 308 F.2d 15 (C.A. Cal. 1962).

Appellant urges that based on the evidence (see Appellant's Exhibit 6), the trial court exceeded its discretion in granting the Trustee's motion to correct the Stipulation of February 21, 1967.

"Inadvertence" might have been reasonable if there had been no particular import to the "Ann Clark" Property prior to the date of the Stipulation. But the attorney for the Trustee in the arguments recorded on October 9,

1967, and October 18, 1967 (Appellant's Exhibit No. 6), made it very clear that there had been a great deal of work and time spent in relation to the "Ann Clark" Property. This particular piece of property had been a problem that the Trustee and the attorney for the Trustee had spent a good deal of time on and it was a piece of property whose legal description must have been burned into their minds. Yet, the Trustee presented no evidence at all in support of his position, although properly speaking as the moving party the burden was his, while the Appellant did present evidence in the form of testimony from Mr. Magruder, president of the Appellant corporation, and Mr. Magruder's evidence went uncontradicted.

Based on the foregoing facts of the case, based on the law and based on the exhibits, there is no doubt that the Trustee did not meet his burden of going forth with the evidence as to his inadvertence or mistake. He offered no testimony, he offered no affidavits and he offered no exhibits. He merely argued the matter. Yet his position was upheld by the trial court and the order and stipulation vacated. Appellant urges the Court that the Trustee presented no evidence which the trial court could have used as a basis for exercising its discretion

and, therefore, it was reversible error for the lower court to find for the Trustee in the matter of overthrowing the stipulation and setting aside the order in connection therewith.

Respectfully submitted,

/s/ Sidney B. Wolfe

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Of Counsel

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Sidney B. Wolfe

Sidney B. Wolfe